

BEFORE THE BOARD OF LAND COMMISSIONERS AND
THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New)
Rules I through VIII pertaining to state-)
owned navigable waterways)

NOTICE OF PUBLIC HEARING
ON PROPOSED ADOPTION

To: All Concerned Persons

1. On July 11, 2012, at 1:00 p.m., the Department of Natural Resources and Conservation will hold a public hearing in the Director's Conference Room at the Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, Montana to consider the proposed adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 2, 2012, to advise us the nature of the accommodation that you need. Please contact Jessica Jenewein, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT; telephone (406) 444-3544; fax (406) 444-2684; e-mail jjenewein@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS When used in this subchapter, unless a different meaning clearly appears from the context:

- (1) "Bed" means an area on or above state-owned land between the low-water marks of a navigable river channel, excepting any portion of the land 50 feet below the thalweg of the channel and excepting any minerals therein.
- (2) "Board" means the state Board of Land Commissioners.
- (3) "Calculated market value" means the market value of a footprint derived by multiplying the current per acre value of the land above the low-water mark on the adjacent larger parcel nearest the footprint by the footprint area, then discounting the result by fifty percent.
- (4) "Commercial use" means an activity conducted on, within, or over a navigable river for profit, excluding any extraction of minerals, but including, but not limited to:
 - (a) marinas;
 - (b) restaurants; or
 - (c) retail service outlets at that location.
- (5) "Department" means the Department of Natural Resources and Conservation.
- (6) "Easement" means a nonpossessory right of use issued either permanently or for a term of years for a particular purpose in a defined area of servient real property appurtenant to, and for the benefit of a dominant tenement

property, which is binding upon subsequent lessees, users, and owners of the real property.

(7) "Footprint" means:

(a) an area which may be occupied by a structure;

(b) an area which may be occupied for the construction or maintenance of a structure; or

(c) an area of the bed of a navigable river below the low-water mark as provided in 70-16-201, MCA, which may be modified for a private use.

(8) "Land classification" means a categorization of land according to its principal value, as defined in 77-1-401, MCA.

(9) "Land use license" means a contract issued by the department for land use, not to exceed a ten-year term, for any use of state land other than its primary classification which is compatible with the department's multiple use objectives and the primary classification of the land.

(10) "Lease" means a contractual authorization issued by the department to another party or entity for use of a footprint not to exceed 99 years.

(11) "Low-water mark" means the location of the water line of a navigable river at the lowest tenth percentile of historic annual flow as measured by the nearest upstream hydrograph station.

(12) "Marina" means a small harbor, boat basin, or moorage facility operated by a private club, enterprise, or municipality that provides boat berthing, docking and mooring, and incidental services such as mooring buoys, boat hoists/lifts, boat launch ramp, fishing, or retail services.

(13) "Navigable river" means a river adjudicated as navigable for title purposes by a court of competent jurisdiction.

(14) "Public use" means activities on navigable waters that are guaranteed by law to the general public to use navigable waters to fish, hunt, trap, navigate, camp, install docks and wharves, and recreate; provided that no physical occupation by a boat positioned, moored, or anchored in a specific location is made for any longer than fourteen days in any thirty-day period. After the fourteenth day a fee shall be assessed for term use for the entire duration of the stay.

(15) "Specific location" means within a radius of 500 feet of any location where a structure or vessel was previously positioned, moored, or anchored upon the bed of a navigable river.

(16) "Thalweg" means the deepest portion of the active channel of a stream or river.

AUTH: 77-1-204, 77-1-1117, MCA

IMP: 77-1-1110, 77-1-1117, MCA

NEW RULE II PURPOSE AND APPLICABILITY (1) Pursuant to Article X, Section 11(1) of the 1972 Montana Constitution and 70-1-202(1) and 77-1-102(2), MCA, the title to all navigable rivers is held by the board in trust for the benefit of the public.

(2) The board, through the department as the board's administrative arm, shall manage and administer the navigable rivers of the state of Montana to:

(a) ensure the public's right to fully use and enjoy this resource for commerce, navigation, fishing, hunting, recreation and other public trust values; and

(b) generate income from navigable rivers for the public trust in a manner consistent with these rules and other laws.

(3) The department may, upon request by an applicant, issue an easement, lease, or license for the board's approval of the use of a river bed which is not yet adjudicated as navigable.

(a) Any such easement, lease, or license, which is voluntarily sought by an applicant, shall only convey a contingent right to use the riverbed based upon the validity and extent of the board's title to the river bed.

(b) The department may issue such contingent-right easements, leases, and licenses only where the department has historical documentation that the river was susceptible of use in commerce at statehood.

(c) Private use may be made of the bed of an unadjudicated river without prior department authorization, unless and until five years has passed since the department:

(i) has published public notice twice in a newspaper of general circulation in the area of the river that the river has been adjudicated as navigable; and

(ii) has given notice to adjacent landowners that the river has been adjudicated as navigable.

(4) Navigable rivers are classified as class 4 lands under 77-1-401, MCA.

AUTH: 77-1-1109, 77-1-1117, MCA

IMP: 77-1-1109, MCA

NEW RULE III SEVERABILITY (1) If any part of [New Rule I] through [New Rule VIII] is found to be invalid, all valid parts that are severable from the invalid part remain in effect in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

AUTH: 77-1-1117, MCA

IMP: 77-1-1117, MCA

NEW RULE IV AUTHORIZATION FOR USE OF NAVIGABLE WATERWAYS

(1) Except as otherwise provided in this rule, fixed structures placed within the bed of a navigable river or suspended above the bed of a navigable river shall require prior written authorization from the department.

(2) The following uses require no prior written department authorization:

(a) public uses as defined in [New Rule I]; and

(b) uses and structures described in 85-16-101, MCA.

(3) Individuals seeking department authorization for the use of the bed of a navigable river must complete and submit an application form as prescribed by the department.

(4) Department authorization shall be in the form of a lease, license, or easement.

(5) All leases, licenses, or easements shall include a provision reserving all rights and interests other than those specifically granted by the lease, license, or easement. These reservations include, but are not limited to mineral reservations.

(a) No lease, license, or easement issued under this rule shall allow that lessee, licensee, or easement holder to mine upon the premises described therein any:

(i) coal, oil, gas and other minerals; and

(ii) deposits of stone, gravel, sand, gems, and other nonminerals valuable for building, mining, or other commercial purposes.

(6) All necessary federal, state, and local permits shall be acquired by those requesting authorization to use a navigable river or other river as specified in [New Rule II(3)].

(a) Copies of permits must be furnished to the department prior to the department authorizing the use of the bed of a navigable river.

(b) However, the department may choose to issue a lease, license, or easement prior to receipt of permit copies where the lease, license, or easement is conditioned upon the applicant's receipt of a permit and the filing of a copy of the permit with the department.

(7) As provided in 77-1-121, MCA, the department is exempt from the provisions of Title 75, chapter 1, parts 1 and 2, MCA, when issuing a lease, license, or easement for the use of the bed of a navigable river that expressly states that the lease, license, or easement is subject to further permitting under any of the provisions of Title 75 or 82, MCA.

(a) An environmental analysis may be conducted to assess the impact a permanent easement may have on the navigability of the river.

(8) The department may require agreement holders to remove hazards from the river, including structures that are no longer in use.

(9) Leases and easements for the use of the beds of navigable rivers are assignable. Easements for the use of beds of navigable rivers shall be appurtenant to dominant tenement real property.

AUTH: 77-1-1111, 77-1-1115, 77-1-1117, MCA

IMP: 77-1-1115, 77-2-102, MCA

NEW RULE V FEES FOR USES IN NAVIGABLE WATERWAYS

(1) The lease, license, or easement area shall consist of the footprint only.

(2) The application fee for a land use license, lease, or easement for a use of the bed of a navigable waterway is \$50.

(3) The annual fee for a land use license for the use of the bed of a navigable waterway is \$150. The license fee for the first year shall be \$150 without regard to the date when the license term begins.

(4) The fee for a lease for the use of the bed of a navigable waterway shall be the greater of the product of the lease rate multiplied by the calculated market value of the footprint or a minimum fee of \$150. The process for calculating the market value lease rate will be as described in 77-1-905, MCA, and ARM 36.25.915. The department reserves the right to impose higher market value lease rates where the proposed use of the bed subjects the state, the department, or the trust

beneficiaries to greater risk of damage to trust lands. However, generally, the market value lease rates will be guided by consideration of various market and risk factors, including, but not limited to:

- (a) the potential for waste, and the costs of demolition, reclamation, and liability;
 - (b) market evidence; and
 - (c) the current fee schedule developed by the department.
- (5) Any lease for a use of the bed of a navigable waterway beginning after March 1 of a lease year will have a prorated bill for the first year. The prorated bill will include the effective lease date through February 28 of the following year.
- (6) The fee for an easement shall be the greater of:
- (a) fees established per ARM 36.2.1005;
 - (b) the calculated market value of the footprint;
 - (c) market evidence; or
 - (d) current fee schedule developed by the department.
- (7) Application fees for historic land use licenses, leases, and easements will be deposited into the state special revenue fund.
- (a) The revenue from the application fees may be used for processing historic easement applications.
- (8) Lease and license revenues will be deposited into the public land trust fund, according to Article X, Section 5(1) of the Constitution.
- (9) Easement revenues will be deposited into the permanent public land trust fund according to Article X, Section 5(2) of the Constitution.

AUTH: 77-1-209, 77-1-1117, MCA
IMP: 77-1-1117, MCA

NEW RULE VI SELECTION OF LEASE, LICENSE, OR EASEMENT

- (1) An applicant may apply for a land use license for a noncommercial or nonresidential use of the bed of a navigable river requiring a term of ten years or less.
- (2) An applicant may apply for a lease for commercial or residential use of the bed of a navigable river requiring a term of 99 years or less.
 - (a) A lease will be issued by the department through a competitive bid process per 77-1-904, MCA.
- (3) An applicant may apply for an easement for those uses described in 70-30-102 and 77-2-101, MCA, which serve public purposes and which require a permanent easement.

AUTH: 77-1-1115, 77-1-1117, MCA
IMP: 77-1-1115, MCA

NEW RULE VII RELOCATION AND EXPANSION OF FOOTPRINT;

CHANGE OF USE (1) The holder of a lease, license, or easement within a navigable river may increase the size of the footprint or relocate the footprint and associated improvements, or both. The department will determine whether to:

- (a) amend the existing lease, license, or easement; or

(b) issue a new lease, license, or easement.

(2) The holder of a lease, license, or easement for a water diversion shall submit an application as prescribed by the department when a footprint or associated facilities are proposed to be relocated or expanded. Initiation of any work within the low-water marks of the navigable river shall begin only after the application has been submitted to the department and the department has authorized the work.

(3) The expansion or relocation of a lease, license, or easement footprint and associated improvements may be authorized when:

(a) all necessary federal, state, and local permits have been issued;

(b) all payments due to the state for the use of the existing footprint have been paid in full; and

(c) the expanded and/or relocated footprint provides for the same beneficial use.

(i) A footprint for a water irrigation or diversion structure or use proposed for expansion and/or relocation shall be considered to have the same beneficial use when the water right and the property benefitted by the use remain the same as before the expansion and/or relocation.

(4) The department may require the holder of an existing lease, license, or easement to complete an application for a new authorization if the holder proposes to change the beneficial use of the footprint.

(5) Subject to the other provisions of this rule, if the area of the new lease footprint is larger or smaller than the originally approved footprint, the department will adjust the lease fee through a lease amendment to reflect the calculated value of the new footprint.

(6) If the new easement footprint is larger than the originally approved footprint, the department will value the additional easement area according to [New Rule V]. The department will not refund the easement holder if the easement area of the new footprint is smaller than the originally approved footprint.

(7) Full market value of the new footprint will be established through an appraisal conducted in compliance with ARM 36.25.917.

(8) Relocation and expansion of a footprint under a lease, license, or easement which represents a historic use under [New Rule VIII] is exempt from the Montana Environmental Protection Act (MEPA), 77-1-201, et seq., MCA, and the Antiquities Act, 22-3-401, et seq., MCA.

AUTH: 77-1-1116, 77-1-1117, MCA

IMP: 77-1-134, 77-1-1116, MCA

NEW RULE VIII HISTORICAL USES IN NAVIGABLE WATERWAYS

(1) Persons using the bed of a navigable river adjudicated before [the effective date of these rules], without written authorization from the department prior to [the effective date of these rules], that wish to continue the use must complete an application prescribed by the department and provide the application to the department by July 15, 2017.

(2) Persons using the bed of a river adjudicated as navigable after [the effective date of adoption of these rules], without prior written authorization from the

department, that wish to continue their use must complete an application prescribed by the department and submit the application to the department within five years of the date that the department issues a public notice that the river has been adjudicated as navigable. The requirements of this rule do not apply to:

- (a) footprints related to hunting, fishing, or trapping;
- (b) footprints that existed prior to November 8, 1889;
- (c) footprints for which the applicant can show an easement obtained from a state agency prior to [the effective date of these rules], or the date of adjudication, whichever is later; or

- (d) footprints associated with a power site regulated pursuant to Title 77, chapter 4, part 2, MCA.

(3) The authorization shall only include the footprint of the historical use of the navigable river by the applicant or the applicant's predecessor in interest.

(4) The department shall determine if authorization of the use and footprint for which application is made will be a lease, license, or easement according to the criteria in [New Rule VI].

(5) The department shall issue authorization for a lease, license, or easement for an historic use if the applicant provides the following:

- (a) an application fee of \$50;

- (b) a notarized affidavit on a form prescribed by the department demonstrating:

- (i) the applicant or the applicant's predecessor in interest used the bed of a river that has been determined navigable in compliance with [New Rule I(13)], and that the use continues;

- (ii) the historic use of the acreage covered by the footprint occurred prior to [the effective date of these rules], or the date the river was adjudicated as navigable, whichever is later; and

- (iii) the use for which authorization is sought is documented by a statement of identical historic use in a notarized affidavit;

- (c) evidence demonstrating the use for which authorization is sought and describing the footprint of the historic use. Such evidence may include any combination of:

- (i) aerial photographs;

- (ii) a 310 permit issued prior to construction of the historic use;

- (iii) construction or engineering documents;

- (iv) a GPS survey;

- (v) a professional survey by a registered land surveyor; or

- (vi) a water right pertinent to the structure to be permitted; and

- (d) annual payment of the lease or license fee or payment for the full market value of the easement footprint.

(6) The authorization for easements is approved by the board. Leases and licenses may be approved by the department.

(7) The department, at its discretion, may make a site inspection of the use for which authorization is sought.

(8) The department shall waive the survey requirements of 77-2-102, MCA, if the department determines that there is sufficient information available to define the

boundaries of the proposed use for the purposes of recording the easement or issuing a license or lease.

(9) The applicant for authorization of an historic use may request to relocate the use within the navigable river, subject to the requirements of [New Rule VII].

(10) The department is exempt from the requirements of Title 22, chapter 3, part 4, and Title 75, chapter 1, parts 1 and 2, MCA, for issuance of an authorization for historic uses.

AUTH: 77-1-1112, 77-1-1117, 77-2-102, MCA

IMP: 77-1-1112, 77-2-102, MCA

REASONABLE NECESSITY: Chapter 359 of the 2011 Montana Session Laws established procedures for the issuance of leases, licenses, and easements upon the beds of state-owned navigable waterway. This Act was codified as 77-1-121, 77-1-134, 77-1-1109 through 77-1-1117 and 77-2-102, MCA. New Rules I through VIII are reasonably necessary to describe and define the application and leasing processes for leases, licenses, and easements upon the beds of state-owned navigable waterways. The rules address: historical use; use after the effective date of these rules; and the resulting compensation received by the state.

The assumption is that DNRC would process an average of 200 easement applications per year, which would include a \$50 application fee for each application. The application fees would be deposited into the historic riverbed use account to fund the processing of the applications. The proposed fees are expected to apply to approximately 200 easements at \$500 per easement, and would generate approximately \$100,000 for the public land trust fund each year.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Jessica Jenewein, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT; telephone (406) 444-3544; fax (406) 444-2684; e-mail jjenewein@mt.gov, and must be received no later than 5:00 p.m. on July 19, 2012.

5. Jeanne Holmgren, Department of Natural Resources Real Estate Management Bureau, has been designated to preside over and conduct the public hearing.

6. An electronic copy of this Notice of Public Hearing on Proposed Adoption is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Adoption conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have

their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Lucy Richards, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was contacted by e-mail on May 31, 2012.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton
MARY SEXTON
Director
Natural Resources and Conservation

/s/ Tommy Butler
TOMMY BUTLER
Rule Reviewer

Certified to the Secretary of State on June 11, 2012.